NO. 17-8637

IN THE
SUPREME COURT OF THE UNITED STATES

BOBBY JO GIPSON,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY IN SUPPORT OF JOINT PETITION FOR WRIT OF CERTIORARI[1]

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[1] Pursuant to Supreme Court Rule 12.4, Petitioner Keith Walker, also listed herein, joined the Petition seeking review of his Sixth Circuit judgment, as well. The cases involve an identical issue.

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REASONS FOR GRANTING THE PETITION

In its Brief in Opposition, the government attempts to downplay the vital importance of this Court's guidance on the issue raised in the Joint Petition by minimizing the confusion amongst the circuits springing from the vagueness of the mandatory guidelines' residual clause. Since the filing of the Joint Petition, however, a true circuit split has sprung up regarding the issue raised in the Joint Petition. Moreover, litigation regarding closely analogous issues continues and is spawning its own circuit conflicts. Rather than lessening with time, as suggested by the government, confusion regarding whether Johnson's[2] rule applies to the mandatory guidelines has only increased.

In response to the new issues raised in the government's Brief in Opposition, Messrs. Gipson and Walker respectfully present the following.

A. There is a circuit split regarding whether authorizing successive petitions under § 2255(h), seeking relief under Johnson from sentences imposed under the mandatory guidelines is an appropriate application of Section 2255(h)(2).

The government avers that because Mr. Walker's § 2255 motion was a second or successive motion, the provisions of 28 U.S.C. § 2255(h)(2) "may provide an independent basis for denying" Mr. Walker's request for certiorari review. (Br. Opp'n, at 18.) The government elaborates no further upon the argument, but it may be that the government is comparing the words "new right" presented in § 2255(f)(3), addressing the one year statute of limitations applicable to § 2255 petitions generally, to the words "new rule" stated in § 2255(h)(2), applicable when the petitioner is seeking authority to file his successive petition from the applicable court of appeals under § 2244, and upon merits review if that authorization is granted. Compare, 28 U.S.C. § 2255(f)(3), with 28 U.S.C. § 2255(h)(2). Regardless, there is actually a circuit split in this area of

[2] Johnson v. United States, 135 S. Ct. 2551 (2015).

the law, such that the government's efforts to minimize the necessity of this Court's intervention in this increasingly complex morass of habeas law is undermined.

When a petitioner wishes to file a second or successive petition for habeas relief under section 2255(h), the petitioner must receive authorization from the appropriate court of appeals to file the petition. See 28 U.S.C. § 2255(h). The court of appeals may certify the petition if it finds that the petition has made a prima facie showing that the petition "contain[s] . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Id.; 28 U.S.C. § 2244(b)(3)(C) (establishing a prima facie standard, which section 2255(h) incorporates). Without such certification by the court of appeals, the district court lacks jurisdiction to decide the merits of the petition. See Burton v. Stewart, 549 U.S. 147, 157 (2007).

Once the court of appeals has certified the petition, the district court must conduct a "fuller exploration" of whether the petition has satisfied the requirements of section 2255(h). See, e.g., Bennett v. United States, 119 F.3d 468, 469-70 (7th Cir. 1997). While the court of appeals' inquiry is limited to whether the petitioner has made a prima facie showing that the requirements are met, the district court must determine that they are actually met. See Tyler v. Cain, 533 U.S. 656, 661 n.3 (2001).

The issue here is that Beckles v. United States held that the rule in Johnson does not apply to the Sentencing Guidelines, as made advisory by United States v. Booker, 543 U.S. 220, 233 (2005). See Beckles v. United States, 137 S. Ct. 886, 890 (2017). The Beckles Court did not reach the question of whether the Sentencing Guidelines, as applied mandatorily prior to Booker, could be subject to such a challenge under Johnson. See id. Notably, because Beckles was decided on certiorari from a first petition under § 2255, not a second or successive petition implicating

§ 2255(h), see id. at 891, the Court did not address whether the circuits that certified successive petitions under Johnson had correctly interpreted § 2255(h).

As a result, after Beckles, the circuits faced numerous applications to file successive petitions under section 2255(h), seeking relief under Johnson from sentences imposed when the Sentencing Guidelines were mandatory. The circuits have split on whether authorizing such petitions would be an appropriate application of section 2255(h)(2). Compare Moore v. United States, 871 F.3d 72, 74 (1st Cir. 2017) (certifying the successive petition); Vargas v. United States, No. 16-2112, 2017 U.S. App. LEXIS 17158, at *2 (2d Cir. May 8, 2017) (certifying the successive petition); In re Hoffner, 870 F.3d 301, 309-12 (3d Cir. 2017) (same); In re Hubbard, 825 F.3d 225 (4th Cir. 2016) (same, prior to Beckles); In re Patrick, 833 F.3d 584 (6th Cir. 2016) (same); In re Encinias, 821 F.3d 1224 (10th Cir. 2016) (same), with In re Arnick, 826 F.3d 787 (5th Cir. 2016) (denying certification as barred by § 2255(h)); Donnell v. United States, 826 F.3d 1014 (8th Cir. 2016) (same); In re Griffin, 823 F.3d 1350 (11th Cir. 2016) (same). Like Mr. Walker's case, these cases will continue to bubble up through the system and the stage is set for the circuits to split on whether the argument raised herein actually satisfies the requirement of showing a "new rule" when the district courts considers anew whether the claim satisfies the requirements of § 2255(h)(2). The government's position requires an assumption that there is a difference between the "new rule" and "new right" language under §§ 2255(f)(3) and 2255(h)(2), respectively. This is not at all clear, as discussed in the Joint Petition. See Brian R. Means, Federal Habeas Manual: A new rule recognized by the Supreme Court § 9A:29 (Thomson West 2018) ("Although neither § 2244(d)(1)(C) nor § 2255(f)(3) use the term 'new rule,' but instead refer to a 'newly recognized' right that has been made retroactive, circuit courts have held that the two inquiries are equivalent.") (citing Headbird v. U.S., 813 F.3d 1092, 1095-97 (8th Cir. 2016); Butterworth v. U.S., 775 F.3d

459, 464-65 (1st Cir. 2015), cert. denied, 135 S. Ct. 1517 (2015); U.S. v. Mathur, 685 F.3d 396, 398-99 (4th Cir. 2012); Figuereo-Sanchez v. U.S., 678 F.3d 1203, 1207 (11th Cir. 2012)); but see United States v. Colasanti, 282 F. Supp. 3d 1213, 1221 (D. Or. 2017) (concluding that new rights were something different from new rules); United States v. Hurtado-Villa, CR-08-01249-PHX-FJM-MHB, 2011 U.S. Dist. LEXIS 118535, at *18 (D. Ariz. Aug. 12, 2011) ("Although the Supreme Court in Dodd [v. United States, 545 U.S. 353 (2005)] did not specifically address whether or not § 2255(f)(3) contemplates the existence of 'new rights' that do not necessarily constitute 'new rules,' the reasoning highlights the interdependence of the 'new right' and 'retroactive application' clauses of the limitations statute.").

Regardless, the same issue is presented in both instances -- whether Johnson applies to the mandatory guidelines' residual clause. The government relies on the Sixth Circuit case of Homrich v. United States, which purports to address the merits of the issue under § 2255(h)(2) (albeit it in unpublished format, demonstrating the circuit courts' trepidation in these complex areas). (See Br. Opp'n, at 18 (citing Homrich v. United States, No. 17-1612, 2017 U.S. App. LEXIS 24900, at *3 (6th Cir. Dec. 8, 2017), cert. pending, No. 17-9045 (filed May 7, 2018).) Homrich held that Johnson did not announce a new, retroactive rule of constitutional law that invalidated the guidelines' residual clause. Homrich, however, relied wholly upon the Sixth Circuit's decision in Raybon v. United States, 867 F.3d 625, 629-30 (6th Cir. 2017). The discussion pinpointed in Raybon addresses both § 2255(f)(3) and § 2255(h)(2)"s standards as though they are interchangeable. This case illustrates the fact that the same issue needs to be addressed in either event.

As can be seen, the Court's continued silence on this issue is spawning further litigation on closely related issues. Hence, the government has now placed two issues before this Court:

(1) whether Johnson applies retroactively to the mandatory guidelines; and if so, (2) whether this retroactive application will differ depending upon whether the § 2255 motion is a second or successive motion. Indeed, Petitioners suggested in their Joint Petition that their case might be a good vehicle to address this second issue, as well. (See Joint Pet., at 23, n.2.) This is yet further support of Petitioners' position that this Court's intervention has is becoming increasingly crucial.

B. At least one circuit has now found that the rule urged in the Joint Petition would be a substantive rule of criminal procedure.

The government argues that the Court should reject the Joint Petition because it would not fit within the small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. (Br. Opp'n, at 14.) Since Messrs. Gipson and Walker filed their Joint Petition, however, the Seventh Circuit has found that Johnson's substantive rule change applies to the mandatory guidelines. See Cross v. United States, 892 F.3d 288 (7th Cir. 2018). The Seventh Circuit reasoned that the same logic underpinning this Court's decision Welch v. United States, 136 S. Ct. 1257 (2016), which held that Johnson announced a substantive rule made retroactively applicable to cases on collateral review, justifies treating Johnson as substantive, and therefore retroactive, when applied to the mandatory guidelines. See Cross, 892 F.3d at 306-07.

The government noted Cross in its Brief in Opposition, stating it has filed a petition for rehearing en banc before the Seventh Circuit. (See Br. Opp'n, at 15.) Once again, rather than supporting an argument that this issue is becoming less important as time goes on, it is apparent that the conflict is growing. When the Joint Petition was originally filed, there was not a direct circuit conflict because, though the Moore case out of the First Circuit found that Johnson should apply retroactively to the mandatory guidelines, it was decided in the posture of granting a successive § 2255 motion. Cross is a decision squarely on point in the context of deciding the

actual § 2255 motion holding that Johnson does apply retroactively to the mandatory guidelines. Moreover, district courts within the First Circuit are now routinely allowing resentencing based upon Johnson challenges to the mandatory guidelines. See United States v. Roy, 282 F. Supp. 3d 421 (D. Mass. 2017); Reid v. United States, 252 F. Supp. 3d 63, 68 (D. Mass. 2017). Because a circuit split now exists, petitioners' plea carries that much more weight. And finally, the Third Circuit has recently weighed in, holding that Johnson does not apply to the mandatory Guidelines. See United States v. Green, No. 17-2906, 2018 U.S. App. LEXIS 21681, at *2 (3d Cir. Aug. 6, 2018). Petitioners respectfully request the Court take up this Petition on certiorari review to settle this circuit split.

C. Johnson's substantive rule is broader than its narrow holding that the ACCA residual clause is unconstitutional.

Those circuits which have ruled against Messrs. Gipson and Walker's position have narrowly interpreted the right established in Johnson as a right to challenge sentences imposed under the ACCA's residual clause only, not to sentences imposed under identical language in any other circumstance. They find that Justice Sotomayor's concurrence in Beckles, 137 S. Ct. at 903 n.4, acknowledging that the majority left open the question of whether vagueness challenges could be brought against mandatory guidelines, meant that this Court would not recognize a new right to challenge them.

But, this Court's approach in Sessions v. Dimaya, 138 S. Ct. 1204 (2018), when it struck down the Immigration and Nationality Act's ("INA") residual clause, indicates the answer is not this simple. Writing for the majority of the Court, Justice Kagan explained that "Johnson is a straightforward decision, with equally straightforward application" to the INA. Dimaya, 138 S. Ct. at 1213. The Court found that the INA's residual clause suffered from the same infirmities as the ACCA's under the same analysis. Id. While the Dimaya Court did not have to grapple with

the extra procedural challenges imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA") because the case was decided on direct appeal, the decision did at least tacitly suggest that Johnson's substantive rule is broader than its narrow holding that the ACCA's residual clause is unconstitutional.

The government avers that district courts maintained discretion under the mandatory guidelines through the use of substantial assistance and other sorts of departures. (Br. Opp'n, at 13.) The pre-Booker guidelines, however, had the force and effect of law and only very narrowly prescribed when a judge could depart from them. Those guidelines dictated fixed sentencing ranges that judges were required to impose. The same factors leading this Court to determine that the residual clauses in the ACCA and the INA were unconstitutional are equally applicable here. Consequently, it is illogical to treat the ACCA's residual clause differently from the right to challenge the same clause in the mandatory guidelines when both fixed sentences in the same manner. Messrs. Gipson and Walker therefore respectfully request this Court to accept their Joint Petition for certiorari review to settle this issue once and for all.

D. The mandatory guidelines' commentary is unavailable for use by the government to assert an as applied challenge to Mr. Gipson's request for certiorari.

The final new issue raised by the government concerns Mr. Gipson's case only. The government argues that that this Court need not even reach the issue of whether the mandatory guidelines' residual clause is vague as applied to Mr. Gipson because Mr. Gipson's two convictions for attempted second degree burglary in Arizona would have been deemed violent felonies in any event because the guidelines commentary would have encompassed his prior convictions for "residential burglary in Arizona." (See Br. Opp'n, at 17 (citing Beckles, 137 S. Ct. at 897-98 (Ginsburg & Sotomayor, JJ. concurring)). The government reasons that when Mr.

Gipson was sentenced, the Guidelines' commentary clearly included attempted "burglary of a dwelling" within the definition of "crime of violence," outside of the residual clause. Id. This argument falls short for the following reasons.

First, the government admits that it did not rely upon the guidelines commentary opinions of Justices Ginsburg and Sotomayor from Beckles that it is relying upon now to make its "as applied" argument regarding Mr. Gipson. (Br. Opp'n, at 17 n.5.) The government claims it may defend the lower court judgment on "any ground permitted by the law and the record." Id. (citing Dahda v. United States, 138 S. Ct. 1491, 1498 (2018)). Dahda states that this Court may choose to affirm a lower court judgment on such grounds. 138 S. Ct. at 1498. Moreover, in Dahda, the argument raised for the first time by the government was closely related to those made below, while the argument here is not. Id. In similar cases where a contended argument was not presented, developed, and preserved below, this Court has found that the issue was not properly in issue before it and declined to address it. See Michel v. Louisiana, 350 U.S. 91, 101 (1955); see also Taylor v. Freeland & Kronz, 503 U.S. 638, 645-46 (1992) (explaining that ordinarily, this Court does not decide questions not raised or resolved in the lower courts because such principles help to maintain the integrity of the certiorari process).

In any event, in United States v. Navarro, 584 F. App'x 624 (9th Cir. 2014), the Ninth Circuit ruled that violation of Arizona's second degree burglary statute did not qualify categorically as "burglary of a dwelling" under USSG § 2L1.2. There, the government admitted and the court found that a violation of Ariz. Rev. Stat. 13-1507 would not qualify as generic burglary under the categorical approach because: (1) generic burglary does not include burglary of movable structures and, under Section 13-1507, the structure could be either movable or

immovable as defined in Ariz. Rev. Stat. Ann. § 13-1501[3]; and (2) unlike generic burglary, a conviction for second degree burglary could be obtained under section 13-1507 even where the intent to commit the crime was formed after the defendant entered the structure. Navarro, 584 F. App'x at 624-25. (citing United States v. Bonat, 106 F.3d 1472, 1475 (9th Cir. 1997)). The Navarro court did not permit resort to the modified categorical approach because the court deemed Arizona's second degree burglary statute overly broad and indivisible pursuant to Descamps v. United States, 133 S. Ct. 2276 (2013). Navarro, 584 F. App'x at 625. Hence, even if the commentary were taken into account, it is clear that the violation of the statute could not now be deemed a generic "burglary of a dwelling," and could not be used for career offender enhancement purposes.

Finally, it is the government that bears the burden of proof to establish facts that would enhance a sentence, and the level of proof is by a preponderance of the evidence for contested facts. See, e.g., United States v. Silverman, 889 F.2d 1531, 1585 (6th Cir. 1989). The Government has never carried its burden in this case of showing that Mr. Gipson's attempted burglary was actually of a dwelling. In the Brief in Opposition, the government relies upon the very limited facts asserted in the Presentence Report ("PSR") to support its position that Mr. Gipson burglarized dwellings. (See Br. Opp'n, at 4.) The government has never presented any approved supporting document to establish that these were the facts to which Mr. Gipson actually pled guilty. See Shepard v. United States, 544 U.S. 13, 26 (2005) (holding that when the statutory definition of a

[3] The burglary statute was identical at the time of Mr. Gipson's convictions. See A.R.S. § 13-1507 (2018) (providing history stating last legislative year was 1981). The definition section was not. Compare A.R.S. § 13-1501.12 (2018) (defining structure to also include devices that accept electronic or physical currency and is used to conduct commercial transactions, as well as vending machines), with A.R.S. § 13-1501 (1991) (containing history stating last year in which legislation affected this section was (1978), and stating only the definition discussed by the Navarro court).

prior crime to which a defendant pleaded guilty is ambiguous, the court may examine the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information). The PSR is not a Shepard document, and it is well settled that the PSR cannot be used to carry the Government's burden. United States v. Wynn, 579 F.3d 568, 577 (6th Cir. 2009). The only relevant information that can be considered from the PSR for both convictions is simply that Mr. Gipson was convicted of attempted second degree burglary in Arizona in both instances.

CONCLUSION

Even if it were true that the disagreements that exist in the circuits are "shallow" and of "limited importance," it is clear that the disagreements are not resolving themselves. (Br. Opp'n, at 9.) The issue of whether Johnson applies to the mandatory guidelines is not going away, and it is in fact, spawning further circuit splits on closely related issues. Fortunately, the answer is simple. The circuit courts that disagree with Messrs. Gipson and Walker's position are looking for a direct answer from this Court as to whether Johnson's rule applies retroactively to the mandatory guidelines. This Joint Petition is the perfect vehicle to address the issue. Petitioners thus respectfully request that the Court accept their Joint Petition and grant them certiorari review.

DATED: 9th day of August, 2018.

Respectfully submitted,

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